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ABSTRACT

Litigation arising out of the dismissal or nonrenewal of faculty personnel is reviewed briefly. The cases noted concern the official immunity doctrine in relation to college administrators and their personal liability, as well as the administrator's responsibility for the acts of those under his direction. (DB)

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THE EVOLVING PLIGHT OF COLLEGE ADMINISTRATORS IN THE COURTS

by

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For years college administrators enjoyed the privilege of not being a party defendant in litigation arising out of the dismissal or non-renewal of faculty personnel. That privilege, while still in a state of uncertainty, is now becoming non-existent. Of recent vintage is the thrust of such litigation to include college administrators and seek damages from them individually.

In the recent barrage of litigation, college administrators sued in their individual capacities as well as their official capacities have sought to interpose the defense of sovereign or official immunity which would protect them from monetary losses. The state of the law regarding the defense of sovereign or official immunity is perhaps best stated by the court in a case concerning college administrators in Blanton v. State University of New York, 489 F.2d 377 (CA2, 1973):

> "The scope of official immunity from damages in suits under the Civil Rights Act is, to put it mildly, not pellucidly clear."

The U.S. Circuit Courts of Appeal have reached different conclusions so one factor in any such litigation is where the college administrator resides.

In the 2nd Circuit, the court in Jobson v. Henna 355 F.2d 129 (CA 2, 1966) (city officials) refused to apply the official immunity doctrine, thus making the public official personally liable without the benefit of such defense. Also, to the same effect see Board of Trustees of Arkansas A & M

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College v. Davis, 396 F.2d 730 (CA 8, 1968) which involves college administrators. The opposite extreme can be found in a District Court of Virginia case involving college administrators, Kirstein v. Rector and Visitors of U. of Va. 309 F.Supp. 184 and formerly in the 9th Cir., Silver v. Hoffman, 403 F.2d 642 (CA 9, 1969) although that circuit court appears to be receding from that position as is indicated by Williams v. Gould, 486 F.2d 567 (CA 9, 1973) (city officials) where the official immunity doctrine was applied if the official was performing a discretionary act within the scope of the official's authority. Thus, under this position the firing of an employee, a discretionary act, would not bring individual liability upon an administrator regardless of the administrator's reasons or motives.

Perhaps the most widely accepted position is that sovereign or official immunity is available to public officials who act in unquestioned good faith and in the scope of their duties. In the 7th Cir. the court in McLaughlin v. Tilendis, 398 F.2d 287 (CA 7, 1968) a case brought by former probationary teachers, expressed the view that absolute immunity would frustrate the Civil Rights Act and that at best the officials would be entitled to a qualified immunity if they could show the discharge to be based on justifiable grounds. The U.S.D.C. of Nevada, in a case involving college administrators, applied the good faith test in Adamian v. Univ. of Nevada, 359 F.Supp. 825 (D.C. Nov., 1973). The court in the 1st Cir. applied the good faith test and imposed a heavy burden of proof upon the plaintiff in Gaffney v. Silk, 488 F.2d 1248 (CA 1, 1973) (city officials). In the Gaffney case the court extended immunity to administrative officials exercising independent judgment and discretion in good faith in the performance of their duties. The court stated that liability would attach only where the officials subjectively realized their action would deprive the plaintiff of a constitutional right. That court imposed upon the plaintiff the burden of proving that the official's

action was purposely discriminatory, knowingly reckless or willful.

In this, the 5th Circuit, the court is apparently inclined to follow the good faith test. In Norton v. McShane, 332 F.2d 855 (1964) a case involving officials of the U.S. Dept. of Justice, the court expressed the thought that official immunity would receive limited application under the Civil Rights Act. In Martone v. McKeithen, 413 F.2d 1373 (1969) a case against the Governor and other officials of Louisiana, the court expressed the inclination to apply the official immunity doctrine where acts were done in good faith and within the official's scope of authority. In Anderson v. Nosser, 438 F.2d 183 (1971), a case involving state and municipal officials, the court again appeared to extend a qualified privilege for those acting in good faith but stated that damage actions would lie against officials in their individual capacities. In Jacobs v. City of New Orleans, 484 F.2d 24 (1973) the plaintiffs brought a civil rights action against policemen to recover damages from them individually. The court did not require payment of damages by those policemen acting in good faith, but did require others to pay damages. The court did not, however, require the payment of punitive damages or attorneys' fees as it found that the "...actions of defendants...while not justified, were not done with...such malice as implies a spirit of mischief or criminal indifference to civil obligations."

Perhaps a couple of examples will serve to demonstrate the personal liability of administrators. In Donovan v. Reinbold 433 F.2d 738 (CA 9, 1970) the court awarded a lifeguard $5,000 against city officials in their individual capacities for compensatory damages and emotional and mental distress. More significant, however, is the recent case of Smith v. Losee 485 F.2d 334 (CA 10, 1973). In the Smith case a nontenured associate professor brought an action for damages under the Civil Rights Act against the Utah State Board of Education, the president of a junior college and the Deans of Academic Affairs and Applied Arts. When the professor came up for tenure, the tenure committee

voted 3-2 to put him on tenure, the two dissenting votes cast by the deans, who believed he should have been put on probation for another year. The president then recommended the additional year of probation. At the conclusion of the year of probation one dean recommended his dismissal and the vote was 4-1 for dismissal. The president affirmed the dismissal. The professor claimed and the court found his First Amendment rights had been violated. The court then applied the good faith test of official immunity and awarded the plaintiff $4,100 in actual damages against the president and deans and also punitive damages in the amount of $2,500 against the president and also $2,500 against the dean who recommended dismissal.

Not only are administrators finding themselves as defendants in litigation arising out of their exercise of judgment, they are even finding themselves the subject of litigation for the acts of those under their direction. In Carter v. Carlson, 447 F.2d 358 (D.C. Cir., 1973), in a case involving a suit against a police officer, the court stated that the doctrine of respondent superior, responsibility for those under one's direction, was fully applicable in civil rights actions. Other courts, however, have held that when money damages are sought, the general doctrine of respondent superior does not suffice and a showing of some personal responsibility is required. Johnsen v. Glick, 481 F.2d 1028 (CA 2, 1973) (prison warden); Adams v. Pate, 445 F.2d 105 (CA 7, 1971) (warden and prison officials); and Dunham v. Crosby 435 F.2d 1177 (CA 1, 1970) (school board members and superintendents). Apparently the question is still open in this circuit. Anderson v. Nosser, 438 F.2d 183 (CA 5, 1971).

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